No. 76-1785

In the Supreme Court of the United States

OCTOBER TERM, 1977

CALVIN EUGENE FLOWERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General.
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that an investigatory stop of their vehicle by a police officer was made without reasonable suspicion in violation of the Fourth Amendment.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of theft from an interstate shipment, in violation of 18 U.S.C. 659. Petitioner Calvin Flowers was sentenced to three years' imprisonment; petitioner Robert D. Hardin to a two-year term of imprisonment; and petitioner John C. Greichunos to a one-year term. The court of appeals affirmed, one judge dissenting (Pet. App. A), and denied petitioners' petition for rehearing and suggestion for rehearing *en banc*, one judge dissenting (Pet. App. B).

Petitioners were convicted of stealing twenty-three Whirlpool air conditioners which were being shipped interstate by railroad. At approximately 11:30 p.m. on January 23, 1975, Indiana State Trooper Richard Stalbrink stopped a pickup truck being driven by petitioner Flowers and traveling north on U.S. Highway 421 about four and one-half miles north of LaCrosse, Indiana (H. Tr. 4-5; Tr. 8-10).[1] Petitioners Hardin and Greichunos were passengers in the truck, which was fully loaded with brand new cartons of air conditioners visible above the sides and tailgate of the truck (H. Tr. 8, 14; Tr. 10, 58-59). No other traffic was present on the highway at that time (H. Tr. 14).

Trooper Stalbrink was aware that a pickup had been used in a number of recent thefts of cartons of televisions and other items from a railroad yard near Highway 421 in Wilders, Indiana.[2] He thus became suspicious and stopped petitioners' truck when he observed it only seven miles north of that railroad yard on that same highway fully loaded with boxes which appeared to be cartons for television sets (H. Tr. 4, 8-11, 14; Tr. 46, 52, 58-59).

After stopping the vehicle, Trooper Stalbrink asked Flowers for his driver's license and vehicle registration (Tr. 11). Flowers was unable to produce his license, and accompanied the policeman back to his squad car where Stalbrink made a radio check and confirmed that Flowers was properly licensed (H. Tr. 6-7; Tr. 11). Stalbrink told Flowers of the recent television thefts and Flowers responded that the cartons in his pickup contained 25 air

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[1]"H. Tr." refers to the transcript of the hearing on petitioners' motion to suppress. "Tr." refers to the trial transcript.

[2]Trooper Stalbrink had not been informed that a theft from the railroad yard had occurred immediately prior to his stop of petitioners' vehicle (H. Tr. 12-13).

conditioners petitioners had purchased that evening (H. Tr. 5-6; Tr. 12). Stalbrink then brought Hardin and Greichunos back to his vehicle and obtained their identification (Tr. 13). Stalbrink asked Flowers if he could record a serial number from one of the cartons and Flowers agreed (H. Tr. 9, 22-23). Petitioners departed after Stalbrink recorded the serial number from one carton and ascertained by radio check that that air conditioner had not been reported stolen (H. Tr. 5). Subsequent investigation disclosed, however, that this air conditioner was one of twenty-three which had been stolen earlier that evening.

Petitioners contend that Officer Stalbrink was not aware of sufficient "specific and articulable facts," see *Terry* v. *Ohio*, 392 U.S. 1, 21, to establish a reasonable suspicion waranting an investigatory stop of their vehicle, and that the evidence derived from that stop should therefore have been suppressed.

Since the issue posed involves only the application of settled principles of law to a specific set of facts, review by this Court is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. In any event, the record fully answers petitioners' claims.

The record shows that Stalbrink, a police officer with nine years experience (H. Tr. 3), was aware that a pickup truck had been used in a number of recent thefts of cartons of television sets from a railroad yard near U.S. Highway 421 in Wilders, Indiana. When he observed petitioners' pickup truck on that highway late at night only seven miles from the railroad yard and traveling away from the yard fully loaded with similar cartons, he had a reasonable suspicion of criminal activity justifying his investigatory

stop of the vehicle. See *Adams* v. *Williams*, 407 U.S. 143; *Terry* v. *Ohio*, *supra*, 392 U.S. 1; *United States* v. *McDaniel*, 550 F.2d 214 (C.A. 5).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[3]Petitioners also assert that, even if the investigatory stop was based upon reasonable suspicion, the police officer violated the Fourth Amendment by recording the serial number of one of the air conditioners (Pet. 10-11). Petitioners fail to mention, however, that as the court below observed (Pet. App. 4a), petitioner Flowers gave his voluntary consent to Officer Stalbrink's recording of the serial number on one of the cartons. In any event, the protections of the Fourth Amendment were not implicated by this action, since the serial numbers were exhibited on the outside of cartons stacked above the sides of an open pickup truck traveling on a public highway. In these circumstances, petitioners could have had no reasonable expectation of privacy as to the serial numbers of the exposed cartons. See *Cardwell* v. *Lewis*, 417 U.S. 583, 590-591; *Katz* v. *United States*, 389 U.S. 347. Cf. *United States* v. *Watson*, 423 U.S. 411.

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